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No. 75-1487

In the Supreme Court of the United States

OCTOBER TERM, 1976

DANIEL J. EVANS, WILLIAM K. BECK AND GEORGE W. MACFADDEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-16a) is reported at 526 F. 2d 701. The order of the district court (Pet. App. 19a-21a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a) was entered on February 2, 1976, and a petition for rehearing with suggestion for rehearing *en banc* (Pet. App. 16a-17a) was denied on March 15, 1976. The petition for a writ of certiorari was filed on April 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the procedures utilized in selecting the grand and petit juries—under which the deputy clerks,

subject to the supervision of and after consultation with the chief judge of the district in difficult instances, determined the qualifications of and excused from service persons whose names were to be placed in the qualified jury wheel—complied with the Jury Selection and Service Act.

STATUTE INVOLVED

28 U.S.C. 1867(a) provides in pertinent part:

> In criminal cases, * * * the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted on three counts of offenses involving the manufacture, use and possession of explosives and bombs, in violation of 18 U.S.C. 371 and 26 U.S.C. 5861(d) and (f), and were sentenced to imprisonment for from two to ten years. The court of appeals affirmed (Pet. App. 2a-16a).

The evidence showed that petitioner Beck, then the business manager of a local of the Plumbers and Pipefitters Union, was the principal figure in a four-year conspiracy, in which the other petitioners participated, to promote the union's interests through the use of explosive and incendiary bombs, which the conspirators manufactured. The conspirators planned and executed several bombings in connection with union disputes with non-union employers (Tr. 31, 32, 36-37, 971, 975, 986-987, 993), and blew up the hall of the carpenter's union in retaliation for its failure to honor a picket line (Tr. 49, 51, 53-55,

78, 93, 997). Petitioners Beck and MacFadden assisted in the manufacture of bombs used in the conspiracy (Tr. 111, 119-120, 259, 262).

Prior to trial, petitioners moved to dismiss the indictment on the ground that the procedures used to select the grand jury that had indicted them violated the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, and the district court's Plan implementing the Act. Their principal claim was that under the Act and the Plan, the selection of potential jurors for the qualified jury wheel had been improper because it was made by deputy clerks instead of by the district judge. After an evidentiary hearing, the district court denied the motion, holding that the evidence did not establish a substantial failure to comply with either the Act or the Plan (Pet. App. 21a).

The court of appeals affirmed (Pet. App. 3a-12a). It concluded that although there had been "technical deviations" from the requirements of the Act and the Plan in the jury selection process, those minor departures did not constitute a "substantial failure to comply" with the requirements, which under the statute (28 U.S.C. 1867 (a)) is the sole basis for dismissing an indictment or staying the proceedings (Pet. App. 4a, 12a).

ARGUMENT

Petitioners seek reversal of their convictions on the ground that the selection of the panel from which the jurors were drawn violated the Jury Selection and Service Act (and the district court's Plan implementing that Act) because the deputy clerks rather than the chief judge of the district determined the qualifications and the exemptions from service of the persons to be placed on the panels from which the jurors were selected. Although the Act provides various procedures for the selection of and standards for the qualifications of jurors, violations of

those requirements is cause for dismissal of an indictment or reversal of a conviction only if there has been a "substantial failure to comply" with the statutory requirements. The court of appeals, in an opinion upon which we primarily rely, held that although there had been "technical deviations both from the Act and Plan," those departures did not constitute a "substantial failure to comply" with the statute (Pet. App. 4a). That ruling turns upon the facts of this particular case, is correct, and presents no issue warranting further review.

28 U.S.C. 1863(b)(1) provides that the juror selection plan may, as the Plan here in question provided, authorize "the clerk of the court * * * to manage the jury selection process * * * under the supervision and control of the chief judge * * *." See H.R. Rep. No. 1076, 90th Cong., 2d Sess. (1968); Pet. App. 44a. The day-to-day operation of the juror selection system under the Act is a "largely mechanical process" (H.R. Rep. No. 1076, *supra*, at 15), in which the court clerks routinely discharge ministerial responsibilities delegated to them under Section 1863, subject to judicial supervision. S. Rep. No. 891, 90th Cong., 1st Sess. 10 (1967).

This statutory scheme was followed in the present case. Although in most instances the deputy clerks applied the criteria prescribed in the Plan (Pet. App. 5a, nn. 4, 5, 6) —a Plan which the district court had formulated to implement the Act—in close cases they conferred with the chief judge of the district, who stated (C.A. App. 39, 40) that he "confer[red] frequently with each of [the] clerks in conferences in chambers concerning requests to be excused and the grounds therefor," and that, while he "was not aware of each and every excuse granted, [he] was aware" of the manner in which the clerks were performing their duties. This delegation of authority to the clerks was authorized by the district court Plan, which

provides (Pet. App. 44a) that the "clerk * * * is authorized to manage the jury selection process, acting under the supervision and control of the Chief Judge of this court."

In applying the guidelines prescribed in the Act and the Plan, the deputy clerks disqualified or excused 1,878 potential jurors out of 7,318 that had completed questionnaires (Pet. App. 6a).[1] Petitioners apparently suggest that the Act requires the district judge personally to pass upon the qualifications and excuses from jury service of all potential jurors. In view of the large number of such persons—7,318 in the present case—that would be an impossible task. The proper reading of the statute, we submit, is that the district judge has supervisory responsibility to insure that the grand and petit jury panels are chosen in compliance with the Act and the district court Plan.[2] That was the case here. As the court of appeals pointed out (Pet. App. 12a):

> In the case now before us there has been no showing of a thwarting of the Act's goals. The overwhelming majority of the errors alleged to have been committed by clerks in the screening process appear to have resulted not in the discriminatory exclusion

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[1]Where one deputy clerk determined that a potential juror should have been excused, that decision was reviewed by a second deputy clerk (R. 951).

[2]Petitioners also complain about some errors made by the clerks in applying the guidelines in the Act and Plan. For example, working mothers with young children were not automatically excused, nor always were the sick or those who had served on juries in the past two years (Pet. App. 8a and nn. 9, 10, 11, 9a and n. 12). Also, apparently some persons who did not return questionnaires were not summoned to court, as they should have been (Pet. 4). However, as the court of appeals held (Pet. App. 12a), most of the errors were those of overinclusion, and the few examples of mistaken exclusion would not afford a basis for dismissal of the indictment.

from jury service against which the Act was intended to safeguard, but rather in the *inclusion* of persons who perhaps should have been relieved of jury duty. There may have been isolated examples of mistaken exclusion, but these alone do not afford a valid basis for challenging the grand jury [footnote omitted]. * * *.

In sum, no person or group was excluded from jury service on the basis of race, color, religion, sex, national origin, or economic status. No person was shown to have been rejected because of any extra-statutory, subjective criteria. The improprieties in the selection process did not operate to frustrate the goals of the Act. While we in no way mean to imply that the role of the judiciary should be lightly regarded, we conclude that these deviations in the selection process do not constitute a substantial failure to comply with the Act or the Plan.[3]

Petitioners contend (Pet. 7-8) that in holding that the "technical deviations" from the Act did not constitute a "substantial failure to comply" with it, the court of appeals acted inconsistently with the principles of *United States* v. *Giordano*, 416 U.S. 505. In *Giordano* the Court held that where authorizations for electronic surveillance had not been authorized by the Attorney General or an Assistant Attorney General, as required by the Omnibus Crime Control and Safe Streets Act of 1968, the evidence obtained through such invalid interceptions had

[3] *United States* v. *Zirpolo*, 450 F. 2d 424 (C.A. 3), on which petitioners rely (Pet. 11), is distinguishable. The procedures employed in that case resulted in twice as many males as females being on the grand jury panel a result that frustrated the statutory goal of obtaining jury panels which are a representative cross-section of the community.

to be suppressed. The rationale of the decision was that in requiring such authorization of interceptions Congress intended "to centralize and limit this authority" to those officials (416 U.S. 523).

The Jury Selection and Service Act, however, contemplates that the court clerks will play a major role in the jury selection process, and reflects no congressional intention to require the district judge personally to pass upon the qualification of thousands of potential jurors. Moreover, in this Act Congress expressly provided that not every violation would be grounds for dismissing an indictment or reversing a conviction, but only those which amount to a "substantial failure to comply" with the statutory requirements. There was no comparable provision in the statute involved in *Giordano*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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